



**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

**FILED**  
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Pac-West Telecomm, Inc.,

Complainant,

vs.

AT&T Communications of California, Inc., Teleport  
Communications Group of San Francisco, Teleport  
Communications Group of Los Angeles, Teleport  
Communications Group of San Diego,

Defendants.

Case 04-10-024  
(Filed October 20, 2004)

**PETITION OF PAC-WEST TELECOMM, INC. FOR MODIFICATION  
OF DECISION 06-06-055**

Pursuant to Rule 16.4 of the Rules of Practice and Procedure of the Public Utilities Commission of the State of California ("Commission"), Pac-West Telecomm, Inc. ("Pac-West") respectfully submits this Petition for Modification of Decision 06-06-055 ("Petition"). Specifically, in this Petition, Pac-West seeks modification of Ordering Paragraph 2 of Decision 06-06-055<sup>1</sup> ("Decision") to require that the AT&T defendants named above and other AT&T affiliates as applicable ("AT&T") pay interest and late charges that are due under Pac-West's tariff, Schedule Cal CLC 1-T, on the past-due tariff charges ordered to be paid by the Commission in its Decision.

Pac-West bases its Petition on two grounds. First, the Commission's justification for waiving interest and late payment charges in its original Decision is insufficient and has been overwhelmed by AT&T's continued refusal to pay to Pac-West amounts that have become due under the tariff as required by D.06-06-055, in violation

<sup>1</sup> D.06-06-055, *Pac-West Telecomm, Inc., vs. AT&T Communications of California, Inc., Teleport Communications Group of San Francisco, Teleport Communications Group of Los Angeles, Teleport Communications Group of San Diego*, C.04-10-024, June 29, 2006, hereinafter the "Decision."

of that Decision and to Pac-West's serious financial detriment. Second, the Commission's decision to relieve AT&T of its obligation to pay interest and late charges on the amounts found by the Commission to be past due under the tariff is contrary to established legal precedent and is bad public policy. It is well-established under the California "filed rate doctrine" that the terms, conditions and rates in an approved tariff have the force of law and may not be modified or disregarded retroactively, absent fraud or other extraordinary circumstances. Pac-West respectfully requests that the Commission modify Paragraph 2 of D.06-06-055 to provide that AT&T immediately pay interest and late charges on the sum of \$7,115,014.16, the amount AT&T is directed to pay to Pac-West under Ordering Paragraph 1 of D.06-06-055.<sup>2</sup> AT&T has intentionally decided to continue to materially breach Pac-West's applicable tariff, and purposefully violate the Commission's effective Decision.

Given the material financial impact of AT&T's behavior on Pac-West, Pac-West is filing concurrently with this Petition an Emergency Motion for Enforcement of Decision 06-06-055 and Imposition of Sanctions, and For an Order Shortening Time for AT&T to Respond ("Emergency Motion"). The contents of the Emergency Motion, which include details of AT&T's latest failures to pay amounts due under Pac-West's tariff and D.06-06-055, now totaling approximately a quarter of a million dollars, are incorporated into this Petition by reference. Pac-West respectfully urges the Commission to first take expeditious action and grant the relief sought in the Emergency Motion. Then the Commission should promptly consider granting the relief sought in this Petition.

In support of this Petition, Pac-West respectfully states as follows:

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<sup>2</sup> Ordering paragraphs 1 and 2 of D.06-06-055 provide:

1. Within 30 days after the effective date of this decision, AT&T Communications of California, Inc. shall pay to Pac-West Telecomm, Inc. (Pac-West), the sum of \$7,115,014.16.
2. Pac-West may not collect interest or late-charges that would otherwise be due under its tariff, Schedule Cal. CLC 1-T, on the amount set forth in Ordering Paragraph 1.

## **I. INTRODUCTION AND BACKGROUND**

On June 29, 2006, the Commission adopted the Decision. The Decision found that AT&T<sup>3</sup> is obligated to pay Pac-West the traffic termination charges set forth in its effective and applicable tariff on file with the Commission. The Decision is clear that unless and until Pac-West and the AT&T defendants enter into an agreement superseding the tariff, such as an interconnection agreement or traffic exchange agreement, the tariffed charges apply to the traffic AT&T delivers to Pac-West for termination to Pac-West's customers. As detailed in the attached Emergency Motion, the Commission has denied rehearing of its Decision and through its Executive Director denied AT&T's Escrow Request, stating:

In this case, I agree with Pac-West that AT&T has not demonstrated either a likelihood of success in its proposed appeals of D.06-06-055, or that AT&T will be irreparably harmed if it is required to pay Pac-West the sum of \$7,115,014.16 within the timeframe specified in OP 1 of D.06-06-055. In addition, it appears that Pac-West is likely to suffer greater harm if it is deprived of timely payment of this sum than the harm AT&T will suffer if it is required to make the payment and then D.06-06-055 is reversed or annulled.<sup>4</sup>

On November 27, 2006, AT&T filed a complaint against all Commissioners and Pac-West in the District Court for the Northern District of California (the "Court"). AT&T did not request a stay of the Decision or attempt to meet the criteria for such a stay. On March 9, 2007, AT&T filed in the Court proceeding a "Motion for Leave to Make a Deposit with the Court Pursuant to Fed. R. Civ. P. 67" ("Escrow Motion"). On March 13, 2007, a few days subsequent to the Commission's denial of rehearing of the Decision, and prior to any ruling by the Court on the Escrow Motion, AT&T notified Pac-West in

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<sup>3</sup> The defendants in this case are the California utility affiliates of "classic" AT&T. This action was commenced prior to the acquisition of AT&T by SBC and subsequent renaming of SBC and its California affiliates.

<sup>4</sup> Letter to AT&T from the Executive Director dated July 26, 2006, denying AT&T's July 21, 2006, request for an extension of time to comply and to establish an escrow account ("Escrow Request Denial"), attached as Exhibit A to the Emergency Motion.

writing that AT&T "will wait for a ruling by the Court on its motion before making any further payments to Pac-West under Pac-West's tariff."

AT&T's next required payment under the Pac-West tariff was due by April 2, 2007, in the amount of approximately \$758, 036.32. This amount includes amounts payable for termination of traffic originated by former AT&T affiliate TCI under OCN 7610. Both the current holder of this OCN, namely Comcast, and AT&T have informed Pac-West that AT&T retains administrative control over payment of these charges; i.e., AT&T is responsible for making appropriate payments under the Pac-West tariff for this OCN. Even if the Court establishes the escrow account sought by AT&T, AT&T itself has represented to the Court that it is not going to deposit there the large preponderance of the payments that are the subject of the Emergency Motion. (See, Declaration of Mr. John Sumpter, filed concurrently herewith in support of the Emergency Motion.)

AT&T has not sought or obtained from either this Commission or from the Court a stay that would excuse AT&T from compliance with the requirements of the currently effective Decision. Because the Decision remains effective and binding upon AT&T, AT&T's notice (attached as Exhibit B to the Emergency Motion) constitutes not only clear evidence of its intentional decision to materially breach Pac-West's applicable tariff, but also a clear and unambiguous announcement of its intent to purposefully violate the Commission's effective Decision. This action by AT&T is particularly egregious in light of the Commission's prior denial of AT&T's similar Escrow Request and AT&T's failure to seek, much less obtain, a stay of effectiveness of the Decision.

As fully set out in the Emergency Motion, the Commission should enforce its Decision by all lawful means available to it. Furthermore, the Commission should modify its Decision pursuant to this Petition to require that AT&T pay interest and late charges on the specific amounts found to be due under the Decision.

## **II. AT&T SHOULD BE LIABLE FOR INTEREST AND LATE CHARGES FOR AMOUNTS FOUND TO BE PAST DUE UNDER THE DECISION**

In its complaint, Pac-West sought payment of the late charges and interest applicable to the past due amounts owed by AT&T as provided for in the tariff. The Decision denied this request on the basis that the award of late fees or interest is within the Commission's discretion, the alleged delay by Pac-West in filing its original complaint,<sup>5</sup> and the existence of a "bona fide" dispute as to whether reciprocal compensation was due for the traffic involved.<sup>6</sup>

### **A. THE EQUITABLE GROUNDS FOUND BY THE COMMISSION ARE ILLUSORY, ESTABLISH BAD POLICY AND ARE NOW OVERWHELMED BY AT&T'S CONTINUING VIOLATION OF D.06-06-055.**

Pac-West has been engaged in a battle for over five years to collect from AT&T the tariffed charges that are the subject of this case. AT&T has delivered traffic to Pac-West for termination continuously since 2001, and refused to pay the tariffed charges for that traffic since 2001, except for the time period between July of 2006 and February of 2007. From 2001 until the filing of its Complaint in this matter in 2004, Pac-West attempted to negotiate with AT&T for payment of intercarrier compensation, but was repeatedly rebuffed by AT&T. All attempts at negotiation having failed, on October 20, 2004, Pac-West filed its Complaint in this proceeding.

Pac-West has already suffered extraordinary delay due to AT&T's refusal to remit justified tariff payments to Pac-West. D.06-06-055 fully validated the lawfulness of Pac-West's tariff, the applicability of the tariff to the facts presented, and Pac-West's right to

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<sup>5</sup> The dispute first arose in 2001 and Pac-West did not file its Complaint until 2004. Ironically, Pac-West has been penalized for trying to resolve the issue without litigation. During this period AT&T never itself raised the issue with the Commission, or paid the contested amounts into an escrow account as it sought to do after the Decision was adopted. AT&T's current flaunting of the Decision fully justifies the Commission's reevaluation of the "equitable" circumstances underlying the Decision's determination allowing AT&T to escape payment of interest and late charges due under Pac-West's tariff.

<sup>6</sup> Decision at 35-36, 40.

collect the tariffed charges at issue. From 2001 to July 2006, Pac-West was deprived of receiving its earned revenues, which approximated ten percent of its annual revenues, and its competitive capabilities were consequently materially diminished. AT&T's tactics have had no negative impact on AT&T; to the contrary, AT&T has benefited since it retained the monies due Pac-West and obtained free use and benefit of Pac-West's services. AT&T's actions now are designed to ensure that Pac-West be further financially harmed by the lack of timely cash payments for the services it continues to provide to AT&T. AT&T's informed and knowing actions are anti-competitive in effect and a purposeful violation of the Commission's Decision.

Though it may be within the Commission's discretion to "waive" the award of interest and late fee provisions in lawful Commission-approved tariffs under certain circumstances, the decision to implement such a waiver in the circumstances of this case is bad policy and contrary to the Commission's general policy allowing back billing between carriers.

AT&T is a highly sophisticated carrier well versed in the risks of litigation. It chose to refuse and delay payment and instead risk litigation of the issue of whether any payment was due under the tariff. It continues to pursue its litigious posture with Pac-West while withholding payment of amounts lawfully due under the tariff in violation of the Commission's Decision. AT&T does not shy from litigation with smaller carriers and its financial wherewithal and legal resources to sustain such litigation can overwhelm those of its smaller competitors and threaten their very financial existence. Thus, the Commission's decision to relieve AT&T of the payment of interest and late charges on the ground that "there was a bona fide dispute between Pac-West and AT&T about whether any reciprocal compensation was due" is extremely bad policy. Such a policy encourages a party, particularly one with vastly superior resources, to withhold payment and eschew compromise for any reason, even one only marginally beyond frivolity or

bad faith, rewards non-payment by providing the litigant an interest free loan or cost free capital while it financially distresses its opponent, and frees the nonpaying party of any risk of real detriment in the form of payment of late charges.

Moreover, the waiver of interest and late payment charges is wholly inconsistent with the Commission's general policy applicable to limitations on back billing between carriers. The Decision did not find that Pac-West was neglectful in any manner in attempting to collect the amounts it reasonably believed AT&T owed.<sup>7</sup> The only specific finding of error on Pac-West's part consists of the following:

Pac-West concedes that several years elapsed before it discovered the software error of its billing contractor that caused the prayer for relief in this case nearly to double between the time the complaint was filed and the time hearings were held. Although Pac-West has sought to explain this delay away in the testimony of its witness Mart McCann (Exhibit 1, pp. 3-4), the fact that the error took so long to discover raises significant doubt in our minds whether Pac-West was serious about seeking late charges prior to the filing of a complaint.<sup>8</sup>

Pac-West's correction of its innocent failure to discover its contractor's error in its billing system would ordinarily be time-barred only because of the statute of limitations<sup>9</sup> or the Commission's limitations on back-billing between carriers, neither of which are applicable to these facts. The Commission has specifically considered limitations on back billing between carriers and, unlike its policy governing back billing of consumers, the Commission's practice is that back billing between carriers is permissible if done within the three-year statutory period.<sup>10</sup> Under the circumstances of this case, at worst,

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<sup>7</sup> Presumably, the Decision does not mean to punish Pac-West for attempting to negotiate payment with AT&T, for as long as may be reasonable and for a period within the applicable statute of limitations, before resorting to a complaint and the bringing of formal litigation to the Commission.

<sup>8</sup> Decision at 40.

<sup>9</sup> P.U. Code Section 737 generally imposes a three-year period of limitations on complaints for the collection of lawful tariff charges.

<sup>10</sup> The Commission has decided as a matter of policy not to apply its stricter, shorter limitation on back billing of consumers to the billing of access charges to interexchange carriers ("IXCs"). *Re Rules, Practices, and Procedures of All Telephone Corporations Concerning the Billing of Subscribers for Telephone Calls*, D.88-09-061, 23 CPUC 2d 24 (1986). Billing of access charges to IXCs is directly analogous to billing of the termination charges in question here. The

Pac-West should be limited to calculating and recovering interest only for the period of time that AT&T refused or withheld payment of amounts actually and correctly billed or otherwise properly demanded by Pac-West. To the extent Pac-West made a significant correction after the complaint was filed, forced by innocent mistake in discovering the error of its contractor, interest should accrue at least after the correction and proper claim for payment was made.

In any event, now that the Decision has become and remains effective, there is no bona fide dispute as to whether Pac-West's tariffed charges are payable by AT&T. As we detail in the Emergency Motion and accompanying Declaration of John Sumpter, AT&T's refusal to pay now is aggravated, has become a purposeful and unlawful violation of D.06-66-055.

AT&T's continuing refusal to pay the amounts due under Pac-West's tariff will cause the same material financial harm to Pac-West, and have the same minimal impact on AT&T, as its prior refusals to pay.<sup>11</sup> In aggravation, as fully set out in the Emergency Motion, AT&T is causing this harm with full knowledge of the legal principles underlying the Decision and its own failure to seek or obtain a stay.

The Decision of the Commission to waive interest and late charges is bad policy and precedent in the circumstances presented. The policy defect is made more apparent and its bad incentives proven, by AT&T's continuing course of conduct. The Commission should modify D.06-66-055 to require that AT&T pay interest on the sums found owing by the Commission, at a minimum during the time after which AT&T was properly billed or otherwise properly presented with a claim by Pac-West. It should also under the circumstances enforce the late charges applicable under Pac-West's tariff. It would be bad policy and precedent for the Commission to refuse to enforce the interest

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Commission has not restricted the correction of billing errors between carriers to any period less than the three years permitted by statute.

<sup>11</sup> Escrow Request Denial.



and late payment provisions of Pac-West's tariff in the circumstances of this case. Accordingly, the Commission should modify D.06-06-055 to require AT&T to pay interest and late charges that are due under Pac-West's tariff, Schedule Cal CLC 1-T, for the amounts the Commission found to be owed in Paragraph 1 of the Decision.<sup>12</sup>

**B. THE COMMISSION'S DECISION TO REFUSE TO ENFORCE THE INTEREST AND LATE CHARGE PROVISIONS OF PAC-WEST'S INTRASTATE TARIFF IS CONTRARY TO THE CALIFORNIA "FILED RATE DOCTRINE"**

The Decision's waiver of interest and late charges is also contrary to judicial precedent establishing the California "filed rate doctrine." That precedent imposes strict limits on the Commission's discretion to disregard or modify retroactively the provisions of lawfully filed and Commission-approved tariffs. The "filed rate doctrine" in California generally prohibits the retroactive modification or invalidation of tariffs filed with and approved by the Commission. No doubt the Commission, as a constitutional agency of the state, has equitable powers and in the exercise of those equitable powers may find exceptions to the California filed rate doctrine, in particular in the case of fraud, intentional misrepresentation, or where there are violations of the state's antitrust laws. However, in the circumstances of this case, where Pac-West made innocent billing errors which it corrected upon discovery, and where the Commission's own policy for carrier to carrier back billing would permit correction of Pac-West's bills to AT&T within three years, the filed rate doctrine requires enforcement of the interest and late payment charge provisions of the tariff.

One of the leading cases on the California filed rate doctrine is *Pink Dot, Inc. v. Teleport Communications Group*, 89 Cal.App.4th 407, 107 Cal.Rptr.2d 392 (Cal.App. 2 Dist. 2001). In that case, the court stated:

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<sup>12</sup> The Commission could properly find that interest and late charges are only applicable for the period of time that amounts were properly billed or otherwise claimed to be owed by Pac-West.

Certainly, a state-filed tariff "when so published and filed, ha[s] the force and effect of a statute. (*Dyke Water Co. v. Public Utilities Com.* (1961) 56 Cal.2d 105, 123, 14 Cal.Rptr. 310, 363 P.2d 326.) Also, such tariffs are 'law' and are binding on the public generally." (*Trammell v. Western Union Tel. Co.*, *supra*, 57 Cal.App.3d at pp. 550, 551, 129 Cal.Rptr. 361).

The *Pink Dot* case further discusses the limits of the California filed rate doctrine.

Nonetheless, all state law causes of action are not necessarily precluded. In California, there are limits to the filed rate doctrine, as is apparent in both the PUC's opinion in *Re Telephone Corporations*, *supra*, 71 Cal. P.U.C. 229, as previously discussed, and in various cases. In *Empire West*, *supra*, 12 Cal.3d 805, 117 Cal.Rptr. 423, 528 P.2d 31, for example, the court held that a public utility could be liable for fraud when it falsely claimed to have the expertise to prepare a cost analysis of the operating cost of a central gas heating and cooling system requested by the plaintiff. The plaintiff in *Empire West* was induced to enter the contract based on a false representation, just as Pink Dot alleges Teleport falsely represented its ability to install Caller ID and its expertise in providing telephone services in the Los Angeles market.<sup>13</sup>

The appellate Court went on to cite cases making an exception to the California filed rate doctrine where state antitrust violations are implicated.<sup>14</sup>

This Commission, however, has historically invoked the "filed rate doctrine" in the absence of fraud, or other extraordinary circumstances. For example, in *Reuben H. Donnelley Corporation v. Pacific Bell*, D. 91-01-016, 39 CPUC 2d 209 (1991), the Commission found:

As we noted in our discussion of defendant's interpretation of its Credit Tariff, tariffs have the force and effect of law and must be followed unless deviation is authorized by this Commission. If tariffs are clear and unambiguous, different requirements may not be inserted in the tariffs, even though a change might seem more reasonable and equitable. *Petaluma and Santa Rosa Railroad Co. vs. Commodity Credit Corporation*, 83 F. Supp. 639, 641 (N.D. Cal. 1949), *aff'd*, 190 F.2d 438 (1951).

In its Decision, the Commission properly found that Pac-West's tariff was applicable to the AT&T traffic at issue. The Commission found no fraud, misrepresentation or other bad conduct on the part of Pac-West. At worst, Pac-West

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<sup>13</sup> *Pink Dot* at 416-417.

<sup>14</sup> See, for example, *Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224 at 1241-1242, 18 Cal.Rptr.2d 308.

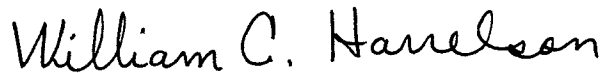
made an innocent billing error which it was permitted to correct and back bill consistent with established Commission practice. Moreover, as we detail in the Emergency Motion, AT&T is now purposefully violating the Commission's directive that it pay the tariff charges found lawful and applicable to AT&T's traffic pursuant to the Decision. Under these circumstances, it is inappropriate, bad policy and contrary to precedent for the Commission to "waive" enforcement of the interest and late payment charge provisions of the tariff as they apply to the amount found owed under the Decision.

### III. CONCLUSION

The Commission should promptly rule on this Petition for Modification to enforce the interest and late charge provisions set forth in the Pac-West tariff and apply them to the amounts originally found past due. Upon modification, Ordering Paragraph 2 should state "AT&T shall pay Pac-West Telecomm, Inc. all interest and late-charges that would be otherwise due under its tariff, Schedule Cal. CLC 1-T, on the amounts set forth in Ordering Paragraph 1."

Dated: April 6, 2007

Respectfully submitted,



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